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OTHMAN A AZIZ

v.

PP

B

COURT OF APPEAL, PUTRAJAYA

ABDUL WAHAB PATAIL JCA

LINTON ALBERT JCA

ROHANA YUSUF JCA

[CRIMINAL APPEAL NO: K-05-178-07-2012]

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18 MARCH 2014

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CRIMINAL LAW: *Murder - Appeal against conviction and sentence - Incompetency of counsel in conduct of defence - Allegation of - Whether there were grounds for setting aside death sentence - Whether proper defence raised - Whether counsel failed to carry out or pursue defences upon instructions from client - Role of counsel - Whether counsel's conduct of case occasioned a miscarriage of justice - Whether there was an error of law or principle warranting appellate intervention*

E

CRIMINAL PROCEDURE: *Trial - Conduct of defence - Incompetency of counsel - Allegation of - Whether there were grounds for setting aside death sentence - Whether proper defence raised - Whether counsel failed to carry out or pursue defences upon instructions from client - Role of counsel - Whether counsel's conduct of case occasioned a miscarriage of justice - Whether there was an error of law or principle warranting appellate intervention*

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LEGAL PROFESSION: *Duty to client - Conduct of criminal trial - Incompetency of counsel - Allegation of - Whether there were grounds for setting aside death sentence - Whether proper defence raised - Whether counsel failed to carry out or pursue defences upon instructions from client - Role of counsel - Whether counsel's conduct of case occasioned a miscarriage of justice - Whether there was an error of law or principle warranting appellate intervention*

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The appellant was charged and tried for the murder of the deceased under s. 302 of the Penal Code. The High Court found the appellant guilty of stabbing and slashing the deceased to death, and he was thus convicted and sentenced under the said charge. Hence, this appeal. The appellant submitted that the

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counsel had failed to execute his basic duty as defence counsel in a criminal case. It was the appellant's argument that (i) no proper defence available was raised or put to the necessary prosecution witnesses; (ii) the evidence of the key prosecution's witnesses was not challenged on the important aspect; (iii) the cross-examination

did not do any justice towards the appellant's case; and (iv) the counsel had failed to elaborate evidence that could assist in establishing basis for the defence of provocation. The grounds of appeal raised herein were: (a) the court appointed counsel's incompetency must result in an order of mistrial; and (b) that in the face of the notes of proceeding, there were sufficient materials to accord a reduction in the charge to s. 304 Penal Code, resulting in the quashing of the death sentence, and to be replaced by a sentence of sufficient years imprisonment.

Held (dismissing appeal; affirming conviction and sentence by High Court)

Per Abdul Wahab Patail JCA delivering the judgment of the court:

- (1) The facts relevant to the question of incompetency concerns "the trial counsel's conduct of his client's case". Such incompetency of counsel basically arises from the failure of counsel to carry out or pursue defences upon instructions from client. Such a ground must be supported by evidence on the record or fresh evidence. Further, such instructions are as to facts from the client's recollection and his defences as a layman, and incompetency arises when such instructions and defences are not carried out or pursued in the counsel's conduct of the case. (para 14)
- (2) Speculative defences or speculation on possible defences that could have been pursued do not constitute evidence of trial counsel's conduct of the case occasioning a miscarriage of justice. More germane to the point, nothing was demonstrated by counsel for the appellant in his submissions herein *ie*, that instructions had been given by the appellant that he was provoked by the actions of the victim but his counsel did not pursue that defence; or that from the instructions of the appellant, there were lines of cross examination to test the testimony of prosecution witness with. (para 13)
- (3) Advocacy for justice in criminal cases, being for good order, good government and security for the protection of the State and the public, does not extend to allow, let alone require counsel to proceed beyond client's instructions, on a frolic of his own, to explore and pursue defences on speculation, to "win" the case for the client at any cost. That may make it advocacy regardless of justice, which corrupts justice, and no less wrong than corruption itself. It is a fine point, and it is

- A dependent upon the ability and competence of counsel to make the distinction, and his integrity and commitment to justice rather than the more remunerative winning the debate, which a trial is not. (para 15)
- B (4) A counsel's role is: (a) to test the testimony of prosecution witnesses as to their reliability and credibility to establish the necessary "*prima facie*" case; (b) to put the defences relied upon to the relevant prosecution witnesses as foundation for the defence in the event the accused is called to enter upon his defence; and in such event (c) to establish the defences relied upon to the standard as required by law. (para 20)
- C
- D (5) In the present case, it was submitted that the defence of sudden and grave provocation could be raised as a result of the deceased's refusal to proceed with their plan of getting married. However, even if it was established that the trial counsel was instructed that such was the provocation, it was not an act of incompetency of counsel not to pursue it as it could not in any case be a grave and sudden provocation.
- E There was no evidence before the court that trial counsel was so instructed. There was thus no error of law, principle or of fact or failure of appreciation of facts and evidence as to warrant appellate intervention. (paras 22, 25 & 26)

Bahasa Malaysia Translation Of Headnotes

- F Perayu telah dituduh dan dibicarakan untuk pembunuhan si mati di bawah s. 302 Kanun Keseksaan. Mahkamah Tinggi mendapati perayu bersalah menikam dan menetak si mati sehingga mati, dengan itu perayu telah disabitkan dan dihukum di bawah
- G pertuduhan tersebut. Oleh itu, rayuan ini. Perayu berhujah bahawa peguam telah gagal melaksanakan tanggungjawab asasny sebagai peguam pembelaan dalam satu kes jenayah. Adalah hujahan perayu bahawa (i) tiada pembelaan wajar yang dibangkitkan atau dikemukakan kepada saksi-saksi pendakwaan; (ii) keterangan saksi-
- H saksi pendakwaan tidak dibantah dari segi aspek penting; (iii) proses pemeriksaan balas tidak membawa keadilan kepada kes perayu; dan (iv) peguam telah gagal untuk menghuraikan keterangan dengan lebih lanjut lagi untuk menyokong pembuktian asas bagi pembelaan provokasi. Alasan-alasan rayuan yang
- I dibangkitkan adalah (a) ketidakceapan peguam yang dilantik oleh mahkamah mesti mengakibatkan suatu perintah pengadilan yang salah; dan (b) berhadapan dengan nota prosiding, terdapat bahan-bahan yang memadai bagi memberikan pengurangan dalam

pertuduhan s. 304 Kanun Keseksaan, yang boleh menyebabkan hukuman mati dibatalkan, dan digantikan dengan hukuman penjara untuk beberapa tahun yang memadai.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman Mahkamah Tinggi)

Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

- (1) Fakta-fakta yang relevan kepada persoalan ketidakcekapan melibatkan “pengendalian peguam terhadap kes anak guaman semasa perbicaraan”. Ketidakcekapan peguam sebegitu berbangkit daripada kegagalan peguam untuk menjalankan atau meneruskan pembelaan dengan arahan daripada anak guaman. Alasan sebegitu harus disokong dengan keterangan atas rekod atau keterangan baru. Selanjutnya, arahan tersebut adalah berkenaan fakta daripada ingatan kembali anak guaman dan pembelaannya sebagai orang bukan pakar, dan ketidakcekapan berbangkit apabila arahan dan pembelaan tersebut tidak dilaksanakan atau diteruskan dalam pengendalian kes oleh peguam itu.
- (2) Pembelaan spekulatif atau spekulasi terhadap pembelaan berkemungkinan yang boleh dilaksanakan tidak membuktikan keterangan yang menunjukkan pengendalian kes oleh peguam semasa perbicaraan telah menyebabkan satu salah laksana keadilan. Lebih tepat sekali, tiada apa-apa yang telah ditunjukkan oleh peguam perayu dalam hujahannya bahawa arahan telah diberi oleh perayu bahawa dia telah diprovokasi oleh tingkah laku mangsa tetapi peguamnya tidak melaksanakan pembelaan itu; atau terdapatnya garisan-garisan periksa balas untuk menguji testimoni saksi-saksi pendakwa daripada arahan-arahan yang diberikan oleh perayu.
- (3) Kepeguaman untuk keadilan dalam kes-kes jenayah, untuk ketertiban, kerajaan yang bagus dan keselamatan untuk perlindungan Negeri dan pihak awam, tidak diperluaskan untuk membenarkan, atau memerlukan peguam untuk meneruskan kes di luar arahan anak guam, sesuka hatinya, untuk meneroka dan mengejar pembelaan mengikut spekulasi, untuk “menang” kes untuk anak guam atas apa-apa kos. Itu boleh membuatkan ia kepeguaman tanpa mengira keadilan, yang merosakkan keadilan, dan tidak kurang zalim daripada rasuah itu sendiri. Ia adalah satu titik halus, dan ia adalah bergantung kepada keupayaan dan kecekapan peguam untuk membuat perbezaan, serta

- A integriti dan komitmennya kepada keadilan daripada memenangi pertikaian yang lebih menguntungkan, di mana perbicaraan bukanlah sebegitu.
- B (4) Peranan peguam adalah: (a) untuk menguji testimoni saksi-saksi pihak pendakwaan untuk kebolehpercayaan dan kredibiliti mereka bagi membuktikan kes “*prima facie*”; (b) untuk meletakkan pembelaan yang ditaruhkan kepada saksi-saksi pihak pendakwaan yang relevan sebagai asas untuk pembelaan sekiranya tertuduh dipanggil untuk memasukkan pembelaannya; dan dalam keadaan itu (c) untuk membuktikan pembelaan yang ditaruhkan mematuhi standard yang dikehendaki oleh undang-undang.
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- D (5) Dalam kes ini, ia telah diujahkan bahawa pembelaan provokasi mengejut dan berat boleh dibangkitkan akibat keengganan si mati untuk meneruskan dengan rancangannya mengahwini tertuduh. Walau bagaimanapun, jika telah dibuktikan bahawa peguam telah diarahkan bahawa terdapat provokasi, ia bukanlah tindakan ketidakcekapan peguam untuk tidak meneruskannya kerana ia tidak boleh dalam apa-apa hal menjadi provokasi mengejut dan berat. Tiada keterangan di hadapan mahkamah bahawa peguam telah diarahkan untuk berbuat demikian. Oleh itu, tiada kekhilafan undang-undang, prinsip atau fakta atau kegagalan penghayatan fakta dan keterangan bagi mewajarkan campur tangan rayuan.
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Case(s) referred to:

Chong Ching Yuen v. The Hong Kong Special Administrative Region [2004] HKCFA 16 (*refd*)

PP v. Choo Chuan Wang [1992] 2 CLJ 1242 HC (*refd*)

G *R v. Pointon* [1985] 1 NZLR 109 CA (*refd*)

R v. Young and Robinson [1978] Crim LR 163 (*refd*)

Sankar v. The State [1994] UKPC 1 (*refd*)

Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC (*refd*)

Wong Lai Fatt v. PP [1973] 1 LNS 175 (*refd*)

H Legislation referred to:

Federal Constitution, art. 5(1)

Penal Code, ss. 302, 304

*For the appellant - Haniff Khatri (Nik Zarith Nik Moustpha with him);
M/s Faizal Rahman & Co*

I *For the respondent - Nadia Hanim Mohd Tajuddin; DPP*

[Appeal from High Court, Alor Setar; Criminal Trial No: 45B-41-10-2011]

Reported by Suhainah Wahiduddin

JUDGMENT**Abdul Wahab Patail JCA:**

[1] The appellant Othman bin A. Aziz was charged and tried, and on 26 June 2012, was convicted and sentenced under the charge:

Bahawa kamu, pada 2hb Mei 2011, antara jam lebih kurang 8.45 malam hingga 03/05/2011 jam lebih kurang 12.45 pagi, bertempat di dalam bilik No. G12, di sebuah rumah No. 1926H, Taman Mahkota, Jalan Stadium, Alor Setar, di dalam daerah Kota Setar, dalam Negeri Kedah Darul Aman, telah melakukan pembunuhan ke atas RATNA SUFIZAHRIYANTI BINTI OMAR (NO. KP.: 880705-26-5534). Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] The grounds of appeal in the appellant's "petisyen rayuan pindaan", was helpfully summarised by counsel as follows:

- (a) The court appointed counsel's incompetency must result in an order of mistrial;
- (b) That in the face of notes of proceeding, there were sufficient materials to accord a reduction in the charge to s. 304 of the Penal Code, resulting in the quashing of the death sentence, and to be replaced by a sentence of sufficient years imprisonment.

[3] Counsel relied upon *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93 FC; [2011] 1 MLJ 471 FC.

[4] This ground of incompetency of counsel is founded upon the implication of a right founded upon art. 5(1) of the Federal Constitution in favour of an accused person to a fair hearing within a reasonable time by an impartial court established by law. See *Public Prosecutor v. Choo Chuan Wang* [1992] 2 CLJ 1242 HC affirmed in *Shamim Reza Abdul Samad v. PP (supra)*. The Federal Court accepted that the right to be represented by competent counsel forms part of the right to a fair trial, and is a constitutionally guaranteed right.

[5] The test adopted by the Federal Court was the formulation by Lord Woolf in his speech in the Privy Council in *Sankar v. The State* [1994] UKPC 1, where he said:

- A 11. On the evidence which is available to their Lordships of what occurred before the trial judge, their Lordships agree with the conclusions of the Court of Appeal as to this aspect of this appeal. The difficulties were brought about by the refusal of the defence advocate to accept the rulings of the trial judge. This
- B obviously created very real difficulties for the trial judge which no doubt he dealt with as well as he could. In an extreme situation where the defendant is deprived of the necessities of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction and will do so if it appears there has been a
- C miscarriage of justice. However if there was no more to this case than the exchanges between counsel and the trial judge this would certainly not be a case in which it would be appropriate for an appellate court to intervene.
- D [6] The Federal Court in *Shamim Reza Abdul Samad v. PP* (*supra*) held:
- E [6] That, then, is the state of the authorities. In our considered judgment, the incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed provided that (i) such incompetence must be flagrant in the circumstances of the given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice. Nothing short will suffice. And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two
- F departments. Further, in the ordinary way, a court whether at first instance or at the appellate state will of course have regard to its paramount function and duty to ensure that justice is done so that the incompetence of counsel will not factor into the equation. As the Federal Court said in *Wong Lai Fatt v. Public Prosecutor* [1973] 1 LNS 175:
- G The paramount function and duty of the courts is to see that justice is done in all cases. As stated by Lord Denning MR in *Doyle v. Olby Ltd* [1969] 2 QB 159, 166:
- H We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side.
- I [7] We would add that in *R v. Young and Robinson* [1978] Crim LR 163, it was noted that while “it has long been a principle that judges should protect the accused ..., it was rare that they had to protect them from their own counsel”. This was reflected as a

caution in the decision of the Court of Final Appeal of Hong Kong in *Chong Ching Yuen v. The Hong Kong Special Administrative Region* [2004] HKCFA 16 where Bokhary PJ referred to the judgement of Cooke J in *R v. Pointon* [1985] 1 NZLR 109 CA that it was necessary ‘to be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel’. It is in our view that every counsel admitted to the bar in accordance with the Legal Profession Act 1976 are competent unless proven otherwise upon a balance of probabilities and not upon speculation.

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[8] We have dealt with the above at some length so as to ensure that the subject of “incompetency of counsel” as a ground of appeal is not taken out of context. It is not any alleged incompetency raised at the appeal stage by counsel, suggesting, as often as not in hindsight, that he would have pursued another line of defence. It is quintessentially a delicate balance between very valid considerations in *Wong Lai Fatt v. Public Prosecutor (supra)* to ensure that justice is done in all cases, and the right to a fair trial denied by incompetency of counsel.

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[9] We observe that although the Federal Court in *Shamim Reza Abdul Samad v. PP (supra)* used the phrase “conduct of counsel”, the context shows it is not the personal conduct of counsel, but “the conduct of the case by counsel” that is referred to. This is obvious from the authorities cited, for example *Sankar v. The State (supra)*. It is an essential distinction since personal conduct of counsel is wholly irrelevant and is an error if taken into consideration, and incompetency of counsel in the conduct of the case which causes a miscarriage of justice.

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[10] We conclude that the choice of the words “In an extreme situation where the defendant is deprived of the necessities of a fair trial then even though it is his own advocate who is responsible ...” in *Sankar v. The State (supra)* and “Nothing short will suffice. And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments” in *Shamim Reza Abdul Samad v. PP (supra)*, reflect clearly how that balance is achieved. We conclude the ground of incompetency of counsel stands only by successfully demonstrating to the appellate court for its consideration trial counsel’s conduct of the case as a whole

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I

A occasioning a miscarriage of justice and, to repeat the words of the Federal Court in the case cited above, “not merely to his or her failure in one or two departments”.

[11] In the case before us, counsel submitted:

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(a) SP1 (victim’s mother):

C

(i) In her EIC she acknowledged knowing the appellant since 2008. Further to that, there was no cross-examination in regards to this.

D

(ii) The counsel had failed to elaborate further the knowledge of SP1 on the details of the relationship between the victim and the appellant, which would go a long way in assisting to establish basis for the defence of provocation.

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(b) SP4 (Forensic Expert-Doctor):

(i) There were merely six (6) questions in cross-examination.

(ii) None of those raise sufficient defence of any kind.

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(iii) The counsel did not challenge the evidence in EIC of SP4.

(iv) Again, the defence counsel did not take full opportunity to establish the necessary basis to raise any legible defence in law.

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(c) SP5 (Police Corporal at the Alor Setar Police Station (inquiry counter):

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(i) Every first witness who had the opportunity to have sight at the appellant immediately after the incident; upon the appellant surrendering himself at the police station accompanied by SP9.

(ii) There was no cross-examination.

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(d) SP6 (Investigating Officer):

(i) There were only ten (10) questions in cross-examination.

(ii) SP6 evidence in EIC was not challenged.

- (iii) There was no introduction of any defence issued through SP6. **A**
- (e) SP8 (the senior police officer at the Alor Setar Police Station):
- (i) The second witness who had the opportunity to have sight at the appellant immediately after the incident; upon the appellant surrendering himself at the police station accompanied by SP9. **B**
- (ii) Only one (1) question cross-examination questioned was asked. **C**
- (iii) The evidence in EIC was not challenged.
- (f) SP9 (the appellant's employer):
- (i) In his EIC, SP9 testified that the Appellant met him after the incident in the same night and SP9's evidences was never challenged by the counsel. **D**
- (ii) SP9 is the very first witness who had the opportunity to have sight at the appellant immediately after the incident; prior to the appellant surrender himself at the police station. **E**
- (iii) SP9 also testified that the appellant did tell him the reason that the appellant stab the victim. This evidence was never objected by the counsel in EIC and was never challenged in cross-examination. **F**
- (iv) Only twenty three (23) question was asked during the cross-examination. **G**
- (v) None of the counsel's question had effect of raising any legible proper defence in law.
- [12]** It was submitted by counsel for the appellant that:
- (a) 11.2 Referring to the entire cross-examination that was conducted by the defence counsel, it is clear that; **H**
- (i) No proper defence available was raised or put to necessary prosecution witnesses.
- (ii) The evidence of the key prosecution's witnesses was not challenged on the important aspect. **I**

- A (iii) The cross-examination did not do any justice towards the appellant's case;

B [13] To our minds, the above demonstrates only a theory of the appellant's counsel that on the facts a defence of provocation could have been pursued and the witnesses could have been cross-examined on those and other subjects to develop possible lines of defence. Speculative defences or speculation on possible defences that could have been pursued do not constitute evidence of trial counsel's conduct of the case occasioning a miscarriage.

C More germane to the point, nothing however was demonstrated by counsel for the appellant in his submissions for example:

- (a) That instructions had been given by the appellant that he was provoked by the actions of the victim but his counsel did not pursue that defence, or
- D (b) That from the instructions from the appellant there were lines of cross-examination to test the testimony of prosecution witness with.

E [14] We reminded ourselves that the facts relevant to the question of incompetency concerns the "trial counsel's conduct of his client's case". Such incompetency of counsel basically arises from the failure of counsel to carry out or pursue defences upon instructions from the client. Such a ground must be supported by

F evidence on the record or fresh evidence. Further, it is obviously in this context, that such instructions are as to facts from the client's recollection and his defences as a layman, and incompetency arises when such instructions and defences are not carried out or pursued in the counsel's conduct of the case.

G Justice in criminal cases is after all:

- (a) In the first part of the case, whether the prosecution had proved a "*prima facie* case", ie, all the elements of the charge with no gaps or breaks in the chain of evidence, with no flaws in the evidence adduced of witnesses as to affect their credibility, and
- H (b) In the second part, the accused had or failed to adduce some evidence sufficient to raise a reasonable doubt on material facts laid out in the cross-examination of relevant prosecution witnesses or sufficient evidence certain defences as provided by law.
- I

[15] We reminded ourselves also that, as opposed to civil cases, advocacy for justice in criminal cases, being for good order, good government, and security for the protection of the State and the public, does not extend to allow, let alone require counsel to proceed beyond client's instructions, on a frolic of his own, to explore and pursue defences on speculation, to "win" the case for the client at any cost. That may make it advocacy regardless of justice, which corrupts justice, and no less wrong than corruption itself. It is a fine point, and it is dependent upon the ability and competence of counsel to make the distinction, and his integrity and commitment to justice rather than the more remunerative winning the debate, which a trial is not.

[16] It was further submitted at para. 11.3 of the submissions that "In fact the court appointed counsel went on voyage which led to no legal destination". An example of this as follows:

(i) Cross Examination of SP9:

Q: Saya katakan kamu kawan baik dengan tertuduh?

A: Baik juga sebab hampir setiap hari bersama.

Q: Mengapa kamu tidak berusaha mendapatkan peguam untuk membela dia?

A: Saya ada tanya dan dia kata dia tidak mahu peguam.

Q: Bila?

A: Selepas saya jumpa di lokap, saya hampir setiap bulan jumpa dia dipenjara. Masa itu saya tanya dia tentang peguam dan dia kata tak payah ambil.

[17] While we agree there was hardly any purpose to these questions by the trial counsel, it does not support the question posed "Could it be said that the court appointed counsel has no interest in representing the appellant throughout the trial?"

[18] Counsel then turned to these excerpts from the grounds of judgment of the High Court:

- (a) In the present case I found the confessions are admissible for two reasons. Firstly, there was no objection raised by the defence counsel as to their voluntariness, therefore it is safe to make a finding that the confession was made voluntarily ...

- A (b) Being important evidence, defence counsel should have cross-examined SP9 on this aspect.
- (c) In the present case counsel for the defence argued the accused had successfully raised the defence of unsoundness of mind at the time of committing the murder.
- B (d) In the present case the defence had not produced any evidence that shows he was of unsound mind at the material time. A mere statement in the accused's unsworn statement that he did not realise what actually happened cannot, by any stretch of imagination amount to evidence to prove he was unsound mind at the particular time. It is mere statement. Nothing more.
- C (e) The defence needed to lead evidence to prove the status of the accused's mental capacity at the time when he stabbed and slashed the deceased. Looking through evidence in this case I could not find an *iota* of such evidence.
- D (f) I must also reiterate that the defence of unsoundness of mind was only raised through his statement without any other evidence to support it.
- E [19] It was submitted that this showed that "The conduct/lack of conduct of the counsel had even caught the attention of the trial judge in which the judge commented", and it is clear conclusion, that the court appointed counsel had failed to execute his basic duty as a defence counsel in a criminal case, which is to build up the defence case from the very beginning of the trial.
- F [20] We had taken the time specifically to read and re-read the grounds of judgment. We could not say the excerpts quoted above by counsel were comments on the conduct or lack of conduct of counsel. These were nothing more than statements of reasoning of the High Court, in assessing the state of the case put before it. We are in fact quite concerned with counsel's employment, in his submission, of colloquialisms in the description of a counsel's role, "to build up the defence case from the very beginning of the trial". The correct description of the role is that "counsel's role is:
- G (a) to test the testimony of prosecution witnesses as to their reliability and credibility to establish the necessary "*prima facie*" case, (b) to put the defences relied upon to the relevant prosecution witnesses as foundation for the defence" in the event
- H accused is called to enter upon his defence, and in such event,
- I (c) to establish the defences relied upon to the standard as required by law.

[21] It was also submitted by counsel for the appellant that the High Court had on its own initiative attempted to see if the defence of 'sudden and grave provocation', even though not raised nor submitted by the court appointed defence counsel. Below are the trial judge's finding:

... I also considered whether through the unsworn statement of the accused a defence of sudden and grave provocation can be established. Although it was never been raised (*sic*) and argued by the defence, I consider this approach that I am taking is permissible in view of my duty ...

[22] The High Court further stated:

(a) ... in the present case, the sudden and grave provocation could be raised as a result of deceased's refusal to proceed with their plan of getting married. Her refusal could have provoked the accused to stab her ...

(b) ... if this defence is successfully proved, the act of causing death will only become an offence of culpable homicide not amounting to murder punishable under section 304 of the Penal Code.

(c) ... unfortunately, in the present case, I found the accused's unsworn statement was NOT ENOUGH to prove the defence ...

[23] The second sentence in the excerpt at para. 21 above makes it clear the High Court was justifying as permissible its approach to consider a legal point not submitted upon, in this case whether through the unsworn statement of the accused a defence of grave and sudden provocation can be established. The excerpts at para. 22 above explained the reasoning and set out the conclusion that the unsworn statement of the accused was not sufficient to establish the defence of grave and sudden provocation. The grounds of judgment bears no criticism whatsoever of the conduct of the case by counsel as being incompetent.

[24] In the alternative, counsel for the appellant relying upon the ground that from the prosecution evidence of (a) SP1 who testified that she had met the appellant since 2008 and that she had objected to the victim's relationship with the appellant since the very beginning; (b) SP4 who had testified that the victim was pregnant with a 17 weeks old male foetus; (c) SP7 who had

A verified that the accused and the victim were the biological parents to the male foetus in the victim's womb; and (d) the unsworn testimony of the appellant, submitted:

B 17. ... it is clear that the defence of sudden and grave provocation had already existed despite the failure of the Counsel to go in depth with that defence. However despite the lack of depth, it should not have escaped the attention of the honourable Judicial Commissioner.

C 18. In fact, in the appellant affidavit in support in earlier application to adduce fresh evidence (which application was dismissed by Honourable Court on 31.7.2013). The appellant had affirmed on oath the fact that he had not been met adequately by court appointed Council, for him to have had the opportunity to give the details of his relationship with the victim culminating in the affidavit of sudden and grave provocation of the victim on the fateful night. This occurrence is now imputed by facsimile transmission from the Pokok Sena Prison dated 25.11.2013, confirming that no Counsel had had visited the appellant during the remand of the appellant from Mei 2012 to June 2012. The copy of the said facsimile transmission is annexed hereto as
E Annexure A.

19. There could also be a possibility that the Appellant had given direct instruction to his counsel unfortunately the order was not given full serious attention and was not followed through.

F [25] Upon consideration, we find that even if these facts might form the foundation facts to cause a provocation to become grave and sudden, the key question is what was the provocation? The day when a refusal by a woman or girl to marry the culprit of her pregnant condition, if ever it was accepted as a grave and sudden
G provocation to provide a defence to a charge under s. 302 of the Penal Code, is long and best gone. Hence, even if it is established that the trial counsel was instructed that such was the provocation, it was not an act of incompetency of counsel not to pursue it as it could not in any case be a grave and sudden
H provocation. We would add that there is no evidence before the court that trial counsel was so instructed.

I [26] We find no error of law, principle or of fact or failure of appreciation of facts and evidence as to warrant appellate intervention. We, therefore, dismiss the appeal and affirm the conviction and sentence by the High Court.
